No. 48179-1-II

THE STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

THURSTON COUNTY SUPERIOR COURT NO. 15-2-30198-2

JULIE BRANNBERG,
Respondent,

and

JOSEPH BRANNBERG,
Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A domestic violence protection order was entered against Joseph Brannberg, restricting contact as to two of his four children, based on voluminous trial testimony and written materials that identified at least three acts of domestic violence: in August 2012 and August 2014 against his daughter Kendra, and in March 2015 against his daughter Megan. The commissioner entered written findings and did not make an oral ruling. By all accounts, there were some confusing, seemingly-contradictory language in the commissioner's written findings. Mr. Brannberg filed a motion to revise, and the superior court denied the motion, without further written findings but providing a detailed analysis of the evidence and completely clarifying the ambiguities in the commissioner's written findings.

Now, Mr. Brannberg appeals, focusing entirely on the initial ambiguities of the commissioner's written findings. He does not argue that those findings were not supported by substantial evidence, but hinges the bulk of his argument on what he believes is the legal insufficiency of the written findings to support a DVPO. In doing so, he completely ignores the detailed, clarifying oral findings made by the superior court on

revision and that became part of the record in this case. He also ignores that this Court should, at most, simply remand the findings back to the trial court for clarification. In no instance should the DVPO be vacated on this record.

Mr. Brannberg also takes issue with the commissioner's procedural approach in hearing the DVPO. But the approach taken by the commissioner fits sqarely within the due process requriements of Washington case with respect to expedited DVPO proceedings, and this appeal should fail for that reason as well.

II. STATEMENT OF THE CASE

Joseph and Julie Brannberg[1] were married in 1992 and divorced in 2009.[2] They had four daughters, Moriah, Kendra, Megan, and Kaelyn, born in 1998, 2001, 2004, and 2006.[3] Megan is a cancer survivor and has

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1 The parties and their children are referred to by their first names for clarity, and no disrespect is intended.

2 CCP 8:19. Consistent with Joe's Opening Brief, the Confidential Clerk's Papers will be hereinafter referred to as "CCP," and the hearing transcripts will be identified as follows: "1RP" for March 19, 2015; "2RP" for May 6; "3RP" for May 20; "4RP" for May 27; "5RP" for September 11; and "6RP for September 25, 2015.

3 CCP 8:21-23.

some developmental delays as a result.[4] At the conclusion of the divorce, a parenting plan was entered in June 2009 that provided for shared custody with alternating weeks of residential time.[5]

On March 19, 2015, Julie filed for a domestic violence protection order ("DVPO") in favor of the two middle children, Kendra and Megan.[6] The allegations in the Petition were that Kendra and Megan had been placed in fear by Joe due to his behavior toward them on multiple occasions following the entry of the final parenting plan in 2009.[7] The court granted a temporary order based on the petition.[8]

The court commissioner conducted a multi-day evidentiary hearing/trial on the "full" (non-temporary) DVPO,[9] and issued written

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4 1RP 6:17-25; 3RP 27:13-20; CP 216:11-12.

5 CP 215:23-25.

6 CP 15-25.

7 CP 19-22.

8 CP 26-29. Joe's Opening Brief presents a wealth of substantive and procedural pre-2009 facts that are not relevant to the issues raised on appeal and are not addressed further here.

9 Hearings on the full DVPO were held on May 6, 2015, May 20, 2015, and May 27, 2015. 2RP 1; 3RP 1; 4RP 1.

findings that he drafted without assistance from the parties.[10] He did not make an oral ruling.[11] In the findings, the commissioner issued the DVPO as to Kendra and Megan based on three acts of domestic violence: (1) an August 2012 incident where Joe "became angry with Kendra and put his hands around her neck to lift her up"; (2) an August 2014 incident where Joe "was yelling at Kendra and as a result of this incident, Kendra wrote a suicide note and pills and razors were found on the floor of Kendra's room"; and (3) a March 2015 where Joe became frustrated with Megan over her refusal to do homework and "in frustration pounded on the kitchen table with a fist ... and stated something like 'I am so angry I could kick the f-ing wall.'"[12]

The commissioner's written findings contain contradictions that appear to be scrivener's errors. Specifically, the findings contain the following inconsistent paragraphs as to the three domestic violence incidents that were identified as supporting the DVPO:

> 9. The court finds that the incident in May of 2015 does constitutes [sic] domestic violence. The incident was disturbing to

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10 CP 215-218.

11 *See*, 4RP 75:19-25.

12 CP 216-218.

> the children and even by Mr. Brannberg's testimony constitutes an inappropriate response to a frustrating situation, it is not an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm.
>
> 10. The court finds that the incident from August of 2014 does not constitute domestic violence. It appears that in this situation Mr. Brannberg lacked the appropriate parenting skills to manage his frustration with his children.
> ...
>
> 15. [T]he court finds there is sufficient evidence to conclude that the event in March of 2015 and the incident in August of 2012 occurred, constitute domestic violence and are each individually basis's [sic] to issue a protective Order. Additionally, the incident of August of 2014 probably constitute an act of domestic violence placing Kendra in immediate fear of imminent bodily harm.[13]

The evidentiary hearing on the full DVPO was conducted in three separate hearings over a three-week time span.[14] Each side was permitted one hour of "live" court time for witnesses and argument, including cross-examination, but far more time than that was spent arguing evidentiary and procedural issues.[15] In addition, each side was permitted to supplement the live trial time with an unlimited amount of written materials.[16] The

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13 Id.

14 *See*, note 9, *supra*.

15 2 RP 6:6-7; 9:20-25; 19:17-19; 3RP 18:18-19:23.

16 2RP 11:10-25; 3:7-23.

hearing was continued in one instance to permit attorneys to disseminate the voluminous written materials that were submitted, and plan the presentation of their live trial time accordingly.[17] The hearing was also broken into pieces to allow Joe's counsel to try and resolve problems he had experienced with professional witnesses.[18] Joe's counsel took various positions on disputed evidentiary issues, at one point asking to exclude evidence and emphasizing to the court that DVPOs are handled in short, expedited proceedings.[19]

On July 6, 2015, Joe filed a motion to revise.[20] A hearing was held on September 11, 2015, and the superior court denied the motion and upheld the DVPO in every respect.[21] Although the superior court did not make written findings, it made substantial oral findings explaining — in much greater detail than the commissioner's written findings had — the factual findings/bases it believed supported the DVPO:

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17 2RP 3-12.

18 2RP 18-19.

19 3RP 56:16-22.

20 CP 225-230.

21 5RP 23-27.

(1) Reviewing the GAL report from 2009, the same DV dynamic that was identified then is continuing to occur presently.[22]

(2) The 2008 incident that led Julie to file a DVPO petition that was denied was a situation where Joe "could not control his anger while the parties were in a car and actually opened the door while he was driving and ultimately pulled over but they continue to argue."[23]

(3) Parties' oldest daughter Moriah indicated in counseling session that "sometimes she's afraid of Dad," as far back as 2008.[24]

(4) Moriah had seen Joe throw a dresser, behavior "consistent with what came up during the protection order hearing with the slamming down of the hand, saying that I'm going to kick the Fing wall, that type of uncontrolled anger. It does make kids afraid, not afraid of being disciplined, not being afraid of being sent to their room or placed in a time-out, but they're afraid that they're physically going to be harmed."[25]

(5) It is reasonable for an adult *or* child to fear they are going to be physically harmed where another adult is "in an argument, it was a heated situation, and one party slams their hand down, starts swearing, saying that

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22 5RP 23:12-15.

23 5RP 23:20-24:3.

24 5RP 24:4-7.

25 5RP 24:7-16.

they could destroy things ...."[26]

(6) Kendra indicated in counseling in 2008 or 2009 that she was afraid of her dad when she was in the car with her dad and her dad was so angry in the November 2008 car incident.[27]

(7) Two therapists identified that Joe showed some controlling characteristics. Now in March 2015 "we are in a very similar situation where [Joe] was unable to control himself, unable to control his anger, but it's not just anger. It is using fear to control. That's domestic violence."[28]

(8) The commissioner's "findings are wrong" as to paragraph 9 (March 2015 Megan incident): (a) the findings say the incident was in May of 2015, but it was March 2015; and (b) the March 15 incident "was an act of domestic violence, and it was reasonable that Megan was fearful that her father was going to physically harm her ... based upon his actions.[29]

(9) As to Kendra, there "is substantial evidence in the record to support [the commissioner]'s findings of the act of domestic violence against Kendra, and I will not revise the protection order."[30]

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26 5RP 24:16-25.

27 5RP 25:1-4.

28 5RP 25:5-15.

29 5RP 25:16-22.

30 5RP 26:2-11. The judge did revise the trial court by, among other things, adding a requirements for Joe to participate in

On October 21, 2015, Joe filed a Notice of Appeal.[31]

III. ARGUMENT

A. Standards of Review.

The issuance of a DVPO is reviewed for "a clear showing of abuse" of discretion. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (Div. II 2002) (concerning permanent orders of protection). As to procedural rulings regarding the conduct of DVPO hearings, the trial court's rulings are also reviewed for an abuse of discretion. *Scheib v. Crosby*, 160 Wn. App. 345, 352-53, 247 P.3d 816 (Div. III 2011).

Joe asserts that review in this case "is limited to whether the findings as entered and unrevised support the conclusions of law and the judgment."[32] In fact, "where the trial court has weighed the evidence," appellate review includes "ascertaining whether the findings of fact are supported by substantial evidence and, if so, whether the findings support the conclusions of law and the judgment." *Morgan v. Prudential Ins. Co.*,

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domestic violence treatment based on "the Court having found two acts of domestic violence." 5RP 27:3-10. The Court was puzzled as to why the commissioner had not required DV treatment as part of the DVPO (5RP 26:12-27:3), but ultimately added it to the Temporary Order in the companion family law case, which was also on revision before the Court at the same time. CP 234. The DVPO itself was not altered. CP 233.

[31]CP 237.

[32]Opening Brief, p. 16.

86 Wn.2d 432, 437, 545 P.2d 1193 (1976).

B. Inadequacy Of the Commissioner's Written Findings Is Not a Basis To Vacate DVPO.

The court commissioner entered his own written findings after the conclusion of the evidentiary hearing and did not make an oral ruling. In two instances, the commissioner's findings seem to contradict themselves as to whether he found facts constituting an act of domestic violence.

As to the August 2014 incident involving Kendra, paragraph 10 states that "the incident from August of 2014 does not constitute domestic violence." That seems relatively clear, but the commissioner goes on to state that "[i]t appears that in this situation [Joe] lacked the appropriate parenting skills to manage his frustration with his children." This statement implies that Joe did *not* manage his frustration, and implies that the commissioner meant to write, in the preceding sentence, that the August 2014 incident *does* constitute domestic violence. This interpretation of the ambiguity is confirmed by paragraph 15, in which the commissioner writes that "***the incident of August of 2014 probably constitute [sic] an act of domestic violence placing Kendra in immediate fear of imminent bodily harm.***" (Emphasis added). The use of the word "probably," contrary to Joe's argument,[33] is a reflection of the correct

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[33] Opening Brief, pp. 20-21.

standard of proof for a finding of an act of domestic violence occurred in a DVPO proceeding — preponderance of the evidence.[34] Clearly, then, taking the findings as a whole, the word "not" in paragraph 9 was a scrivener's error and the commissioner found that an act of domestic violence against Kendra occurred in August 2014. The Superior Court obviously agreed on revision.[35]

As to the March 2015 incident involving Megan, paragraph 9 first states that the March 2015 incident (erroneously dated May 2015 by the commissioner, an obvious scrivener's error since that would have post-dated the filing of the Petition), *"does"* constitute domestic violence.[36] The commissioner then writes: "The incident was disturbing to the children and even by Mr. Brannberg's testimony constitutes an inappropriate response to a frustrating situation, it is not an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm."[37] Again, the word "not" is likely also a scrivener's error. In paragraph 15, the commissioner concludes, clearly

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34 Black's Law Dictionary (6th ed.) p. 1182 (preponderance standard means "fact sought to be proved is more probable than not").

35 5RP 26:2-11.

36 CP 216.

37 CP 216.

and unequivocally, that "there is sufficient evidence to conclude that the event in March of 2015 ... occurred, constitute[s] domestic violence and are each individually basis's [sic] to issue a protective Order."[38] Therefore, looking at the findings as a whole, as this court must, the commissioner found that an act of domestic violence against Megan occurred in March 2015. This interpretation of paragraph 9 as a scrivener's error was made by Julie's counsel and accepted by the Superior Court in its oral findings on revision.[39]

Joe seems to believe that the ambiguity/contradictions in the written findings described above simply means he wins and the DVPO must be vacated. But that is not how inadequate or ambiguous findings are handled under Washington law. "Even if inadequate, written findings may be supplemented by the trial court's oral decison or statements in the record." *In re: LaBelle,* 107 Wn.2d 196, 219, 728 P.2d 138 (1986). The court must "look to the entire record ... in order to determine the sufficiency of the evidence supporting the trial courts' ultimate findings ...." *Id.* Further, where, as here, no objections are made in the trial court to written findings, the court of appeals "will give them a liberal construction rather than overturn the judgment based thereon." *Id.*

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38 CP 217.

39 5RP 12:24-13:7; 25:16-22.

This is not a case, as Joe seems to suggest, where we are evaluating clear findings that are legally deficient. The findings, if they mean what they clearly say they do in paragraph 15, are sufficient to uphold the DVPO. There are two ambiguious and seemingly-contradictory statements in the findings, but we know the commissioner must have been typing fast and capable of scrivener's errors, based on the obviously-wrong date in paragraph 9. And that is how the Superior Court interpreted the findings on revision. Joe should not be able to capitalize on such an error to vacate a valid order. Even where a trial court's findings are too inadequate to permit meaningful review, the appropriate remedy is to remand to the trial court for supplemental or clarifying findings. *See, Lawrence v. Lawrence*, 104 Wn. App. 683, 686, 20 P.3d 972 (Div. I 2001).

Thus, if this Court needs to be *certain* what was meant by the commissioner's admittedly-confusing statements in paragraphs 9 and 10, it would need to simply remand for clarification of those two paragraphs. Julie is confident that such a clarification would confirm that the court found that acts of domestic violence occurred in March 2015, August 2014, and August 2012. For the reasons explained in the next two sections, however, Julie does not believe that remand will be necessary.

C. The Oral Findings of the Superior Court On Revision Supplement the Commissioner's Earlier Written Findings, and Are More Than Adequate To Support DVPO.

Although the commissioner did not make oral findings that could help us interpret the written findings supporting the DVPO, the superior court, on the motion to revise, did. The judge made extensive oral findings, clarifying her interpretation of the contradictory written findings of the commissioner, and fleshing them out with a deeper analysis. Because Joe's appeal is from the superior court's ruling on revision, not the commissioner's earlier ruling, the extensive oral findings of the superior court judge *supplement* the commissioner's written findings and must be analyzed to determine if they adequately support the DVPO. In this case, the superior court's oral findings are more than adequate and the this appeal should be denied.

Regardless of the inadequacy of the commissioner's findings, where there has been a motion to revise, the Court of Appeals reviews the *superior court's* ruling, not the commissioner's. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). "On revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based on the evidence and issues presented to the commissioner." *Id.* Where the superior court denies a motion to revise without making findings of its own, the superior court "adopts the commissioner's

findings, conclusions, and rulings as its own." *State ex rel. JVG v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (Div. I 2007). But of course, "[i]nadequate written findings may be supplemented by the trial court's oral decision or statements in the record." *In re Marriage of Monaghan*, 78 Wn. App. 918, 925, 899 P.2d 841 (Div. II 1995); *accord, LaBelle*, 107 Wn.2d at 219. So even where, as here, deficiencies in the commissioner's written findings become deficiencies in the superior court's written findings, statements within the superior court's oral ruling *on revision* will supplement those written findings, just as would the commissioner's own in the initial hearing.

The superior court reviews all the evidence and issues presented to the commissioner. Because review is de novo, the superior court is not bound by the commissioner's analysis, but may draw on the entire record to determine whether the commissioner's rulings were correct. *See, Ramer*, 151 Wn.2d at 113. In this case, the superior court's oral ruling on revision clarifies and expands upon the more-than-sufficient basis for the DVPO.

As to Megan, the court found that Joe's actions in March 2015 connected directly to his previously-documented anger control issues: "what is happening today was identified back in 2009 ... consistent with what ultimately came up during the protection order hearing ... [if] one

party slams their hand down, starts swearing, saying that they could destroy things, it is reasonable for a person to fear that they are going to be physically harmed ...."[40] The previously-identified incidents referenced by the judge — documented in the GAL report, in the court record[41] — included Joe throwing a dresser in front of one of the children,[42] and a November 2008 incident where Joe "could not control his anger while the parties were in a car and actually opened the door while he was driving ...."[43] The court concluded that Joe was "unable to control himself, unable to control his anger, but it's not just anger. It is using fear to control. That's domestic violence."[44]

These findings, in combination with important written findings of the commissioner — such as that Megan faced chemotherapy for leukemia "which resulted in mental and social development issues"[45] — more than support the conclusion of law that an act of domestic violence occurred. The superior court unequivocally clarified any ambiguity about whether

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40 5RP 23:10-24:25.

41 CCP 1-18.

42 5RP 24:6-8.

43 5RP 23:25-24:2.

44 5RP 25:12-15.

45 CP 216:11-12.

the court had ruled that an act of domestic violence had occurred against Megan in March 2015:

> [T]he findings are wrong. The findings say the incident was in May of 2015. It was in March of 2015. ***That was an act of domestic violence***, and it was reasonable that Megan was fearful that her father was going to physically harm her, more than discipline her, but physically harm her based upon his actions.[46]

And this was not the court's only clear statement that the March 2015 incident *did* constitute behavior "that would have lead a reasonable individual to believe they were at risk of imminent bodily harm."[47] After an analysis of the superior court's oral ruling, then, the argument that the record is somehow unclear about whether an act of domestic violence was found by the superior court against Megan (because of paragraph 9 of the written findings) is without merit.

As to Kendra, the superior court traced a connection between her fear of her father from recent incidents (August 2012/August 2014) to the November 2008 incident involving the car, citing to evidence provided by one of the counselors indicating that Kendra was afraid of her father based on that incident, and that he had exhibited similar recent behaviors.[48] The superior court also clarified that the commissioner *had* found an act of

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46 5RP 25:16-22 (emphasis added).

47 See, 5RP 24:8-25.

48 5RP 25:1-15.

domestic violence against Kendra (though the court was not clear about which one) and the superior court found that it was supported by substantial evidence.[49]

Because these oral findings of the superior court are appropriately viewed as a supplement to the commissioner's written findings — to the extent the written findings are deemed inadequate — they are more than adequate to clarify the ambiguities in the written findings and support the DVPO issued in this case. Joe's appeal, it should be noted, fails to address or analyze the superior court's in-depth oral ruling, and as such, fails to address the most obvious basis on which this court can uphold the DVPO.

D. The DVPO As To Kendra Survives On At Least Three Different Bases.

With respect to Kendra, Joe's appeal argues that the contradiction in the written findings regarding the August 2014 incident means that the court effectively did not find an act of domestic violence occurred in August 2014, and that even though the court *did* find an act occurred in August 2012, that incident by itself cannot support the DVPO as to Kendra due to its age. Unfortunately, this creative argument fails for three separate reasons.

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[49] 5RP 26:2-11.

First, as discussed above, the discrepancy between paragraphs 10 and 15 is not fatal to the finding of DV, and does not mean that the court did not find an act of domestic violence occurred. Though admittedly confusing, this court must look at the entirety of the findings — as well as the superior court's oral rulings on the motion to revise — to interpret the findings and give them a liberal construction.[50] When that analysis is done, the court clearly *did* find that an act of domestic violence occurred in August 2014, and this court need go no further.

Second, even assuming *arguendo* that the court only found an act of domestic violence occurred against Kendra in August 2012 (and not August 2014), this act, coupled with a reasonable present fear, *is* a sufficient basis for a DVPO. Joe's argument is similar to the one made and rejected by the court in *Spence v. Kaminski*.[51] In that case, the appellant complained that the acts of DV found by the trial court were in the past, and this could not support a finding that the victim presently feared imminent physical harm. *Id.* at 330. The court disagreed, holding that to satisfy the statute, and justify a DVPO, there does not need to be a recent act of domestic violence, if there has been a past act *and* fear of future abuse — e.g, where there is continuing relationship and "ongoing

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50 *See discussion*, pages 10-13, *supra*.

51 103 Wn. App. 325, 12 P.3d 1030 (Div. III 2000).

opportunities for conflict." *Id.* at 333-34. The *Spence* court analyzed the relevant domestic violence statutes and concluded: "Nothing in these provisions requires a recent act of domestic violence." *Id.* at 334.

Despite the ambiguity in the written findings as to the August 2014 act, there is no dispute that the commissioner found an act of domestic violence occurred toward Kendra in August 2012.[52] In this case, then, Kendra could be entitled to protection based solely on the August 2012 incident, because of the ample evidence of ongoing fear from Joe's recent behavior,[53] even if the August 2012 incident *in isolation* would not support a DVPO under RCW 26.50.010.[54] She and her father have a continuing relationship, and ongoing opportunities for conflict, and she is witness to renewed displays of anger sufficient to place a reasonable person in fear of physical harm. The court explicitly made that finding.[55] Contrary to implication of Joe's argument,[56] nothing requires the imminent fear be of a

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52 Opening Brief, p. 1; CP 216:17-20; CP 217:1-12, 24-27.

53 CP 217:9-12; CP 56-58; 4RP 50:10-51:10.

54 Although it should be noted that courts are not clear about how much time passing would change a "recent" act of DV into a "past" act. Per *Spence*, the court must simply evaluate the whether the recency of the act, and the status of the relationship, is such that the victim "fears future abuse." 103 Wn. App. at 333.

55 CP 217:9-12.

56 *See*, Opening Brief, p.2.

repetition of the same incident — merely, of a future act of DV. Thus the DVPO as to Kendra can stand on the August 2012 incident alone.

Accordingly, Joe's argument that Julie has raised historical domestic violence events for purely tactical reasons is without merit. In light of the analysis outlined in *Spence*, once an act of domestic violence is proven, *all* past violence between the parties, or observed by the victim, is relevant the court's determination of whether the victim might reasonably "fear future abuse." Similarly, Joe's argument that the August 2012 DV against Kendra is "irrelevant,"[57] and that a DVPO court cannot consider a past act of domestic violence to protect a child from violence is without merit. The case quoted by Joe is a third-party custody case, and applying the general principles quoted by Joe as he suggests in a domestic violence case would fly right in the face of decisions like *Spence v. Kamiski*.[58]

In *Marriage of Stewart*, all of Joe's arguments about constitutional limits on a court's ability to manage a parent's right have contact with his or her children where there has been a DV finding[59] were addressed and rejected. In that case, the appellant argued, just as Joe has, that a

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57 Opening Brief, p.27.

58 103 Wn. App. 325, 12 P.3d 1030 (Div. III 2000); *see also extensive analysis, Marriage of Stewart*, 133 Wn. App. 545, 552-56, 137 P.3d 25 (Div. I 2006).

59 Opening Brief, pp. 27-30.

temporary order prohibiting him contact with his children — pursuant to a one-year DVPO that prohibited contact "pending further order through a parenting plan modification action" — was an inteference with the Parenting Act and a constitutional interference with his right to parent. *Id.* at 551-56. The court disgreed, pointing out that (1) the statutes were not in conflict;[60] (2) the court may interfere in a parental relationship where a child has been harmed or there is a credible threat of harm to a child;[61] and (3) there was no violation of the constitutional right to parent, in part because "the order was entered in contemplation of further proceedings in family court."[62] Similarly here, the DVPO was based on harm or threat of harm to a child, and provided that "parenting time may be ordered in Case No. 09-3-00024-8 (the parties' family law matter)."[63] As such, Joe's constitutional and "parenting plan interference" arguments are without merit.

Third, the DVPO as to Kendra would be supported even if *no* acts of domestic violence were found to have been committed against her, based solely on the act of domestic violence against Megan. As the

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60 *Id.* 552-54.

61 *Id.* at 555.

62 *Id.* at 556.

63 CP 222.

superior court noted in its oral ruling on revision:

> Children don't live in a bubble, and children experience what's happening in their household, and so the children have experienced domestic violence, regardless of whether or not I found there was an act of domestic violence against Moriah, or ... Kaelyn. ... It's not an isolated situation where just one child is experiencing something.[64]

The superior court's analysis is consistent with Washington case law in this area. *See, Stewart,* 133 Wn. App. at 551. In *Stewart*, the appellant challenged the inclusion of his children in a DVPO when there was no allegation of acts of violence against the children. *Id.* But because the children witnessed the assaults against their mother and were afraid for her, "[i]t is also domestic violence, and is a statutory basis for an order of protection." *Id.* Under this reasoning, Kendra could have been properly included in the DVPO even if she had been directly subject to an act of domestic violence at all, based on observed violence toward Megan or her mother, and the fear she expressed to her counselors because of it.[65]

For these three separate reasons, the findings of fact supporting the DVPO as to Kendra are legally sufficient and the trial court should be affirmed. Joe's in-depth policy argument about the connection between DVPOs and parenting plan modifications — and the differing evidentiary

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64 5RP 27:25-28:12.

65 CP 56-58; CP 65-67.

standards between the two (see Opening Brief, pp. 18-25) — is not relevant to whether the DVPO is supported by valid findings under the domestic violence statutes, and is not further addressed in this Brief. Contrary to Joe's assertion,[66] rulings on a DVPO do not have to be viewed from the perspective of parenting plan modification statutes. Joe is free to argue in a future modification proceeding that findings under RCW 26.09.191 would not be appropriate on the record before the court. He has presented no contrary authority; in fact, these very arguments were made and rejected in *Stewart*. 133 Wn. App. at 552-55.

E. The Trial Court's Limits On Live Testimony Was Not an Abuse Of Discretion.

Joe complains that the Commissioner's one-hour-per-side limit on live testimony was an abuse of discretion, a limit that only made sense if the goal was to "simply get done with some sort of a hearing before granting [a] pre-ordained protection order, as opposed to having a fair hearing."[67]

Nothing could be further from the truth. *Both* sides were granted an hour's worth of live testimony/cross-examination to present their

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66 Opening Brief, pp.18-19.

67 Id. at p. 30.

cases.[68] The court gave notice of that limit well in advance of the hearing to permit proper preparation for an orderly presentation of the case.[69] *Both* sides were permitted to supplement that hour of live questioning with an *unlimited* amount of written materials, all submitted well in advance the hearing so as to allow the opposing party to call the adverse witness if cross-examination would be needed.[70] Indeed, Julie's counsel complained during pre-trial hearings about the number of pages that Joe had filed, and asked for clarification that he would be able to respond with an equal number of pages.[71] The Commissioner confirmed that the amount of written materials that could be filed was unlimited, and set up dates for filing and serving such materials in advance of trial so each side would have time to adequately respond.[72] Contrary to Joe's assertion, the proceeding was not a "one size fits all" approach, because each side had the ability to present unlimited written materials as the circumstances of the case required.

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68 2RP 6:6-7; 9:20-25; 19:17-19; 3RP 18:18-19:23.

69 *See, e.g.*, 2RP 9:20-25.

70 2RP 11:11-25; *see also discussion*, 2RP 3-12.

71 2RP 11:8-20.

72 2RP 11:11-16; 15:2-24.

Moreover, the court *did* exercise its discretion during the course of the proceeding to accommodate a fair and complete process, expanding the proceeding over "multiple hours broken up over three different hearing dates"[73] due, in part, to permit Joe's counsel adequate time to get testimony from professional witnesses.[74] The commissioner also made specific efforts to capture all potentially relevant evidence by appointing a guardian to advise one of the children concerning the scope of their release of information to a counselor.[75] Joe's counsel admitted that the DVPO hearings had in fact lasted for a total of 3½ or 4 hours of trial time, [76] and emphasized to the court that DVPOs are generally handled in short, expedited proceedings.[77]

Washington courts have limited the constitutional elements of due process that are required in a DVPO proceeding. *Scheib v. Crosby*, 160 Wn. App. 345, 352, 249 P.3d 184 (Div. III 2011). Many cases have established that the statutory procedures for DVPOs satisfy "'the

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73 5 RP 6:25-7:1.

74 Opening Brief, p. 14; 2RP 18-19.

75 3RP 56-62.

76 4RP 74:10-11.

77 3RP 56:16-22.

inherently flexible demands of procedural due process.'"[78] Joe has not offered any authority for the proposition that a limit on live trial time, that includes a right to cross-examination, and with an unlimited ability to file written materials, violates procedural due process in a DVPO context. To the contrary, Washington case law does not even require a right to cross-examination in a DVPO proceeding. *Gourly,* 158 Wn.2d at 469-70; *Blackmon*, 155 Wn. App. at 722. And in some counties, such as Pierce County, parties are not guaranteed the ability to call live witnesses at all in a DVPO case. Here, the procedure used by the trial court satisfies procedural due process and there was no abuse of discretion.

Further, Joe's argument fails because he has not articulated *anything* in his appeal regarding how the presentation of his case would have been different if he had been given more time to present live testimony and cross-examination versus written materials. He does not point to any witness that was not permitted to be called because of time contraints, or any line of questions that he was not able to cover in the allotted time. Because Joe has not articulated any prejuduce, any error was harmless. *See, Maicke v. RDH, Inc.*, 37 Wn. App. 750, 754, 683 P.2d 227

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[78] *Id.*, *quoting, State v. Karas*, 108 Wn. App. 692, 700, 32 P.3d 1016 (Div. II 2001); *see also*, *Gourly v. Gourly*, 158 Wn.2d 460, 468-69, 145 P.3d 1185 (2006); *Blackmon v. Blackmon*, 155 Wn. App. 715, 722-23, 230 P.3d 233 (Div. II 2010); *Spence v. Kaminski*, 103 Wn. App. 325, 335, 12 P.3d 1030 (Div. III 2000).

(Div. III 1984) ("[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.") (internal quotation omitted).

Moreover, there is no evidence in the record that Joe's trial attorney objected on a substantive basis to the Commissioner's proposed procedure — Joe's one request for additional live trial time beyond the one hour was solely because of "the combative nature of Ms. Brannberg and her answers," not because of any illegitimate interference in the presentation of his case.[79] As such, Joe's argument regarding the DVPO procedure has been waived. RAP 2.5(a).

F. Julie Is Entitled To Attorneys Fees For This Appeal Under RCW 26.50.060(1)(g).

Pursuant to Rule of Appellate Procedure 18.1(b), a request for attorneys fees on appeal may be made if properly raised in the party's opening brief by devoting a section to that issue. Julie is accordingly making a formal attorney fee request under RAP 18.1(b).

Attorneys fees may be awarded when authorized by a contract, statute, or recognized ground in equity. *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983). RCW 26.50.060(1)(g) provides that a petitioner may be granted a monetary judgment for "costs incurred in

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[79] 3RP 106:2-4.

bringing the [DVPO] action, including reasonable attorneys fees." Washington case law has established that this provision extends to attorneys fees for a successful defense of a DVPO on appeal, whether or not attorneys fees were requested at the trial-court level. *Scheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184 (Div. III 2011). "If attorneys fees are allowable at trial, the prevailing party may recover fees on appeal." *Id.*, *citing*, RAP 18.1, *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001).[80]

Clearly, defending against this meritless appeal is a cost incurred by Julie in bringing the original action against Joe under RCW 26.50.060. As such, an award of reasonable attorneys fees for this appeal is appropriate.

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[80] This principle is in accord with other decisions on appellate fees in analogous circumstances. *See, Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 222, 293 P.3d 413 (Div. I 2013) (plaintiff who successfully defended award under WLAD statute was entitled to fees on appeal); *see also*, 25 Wash. Prac., Contract Law and Practice § 14.24 (3d ed. 2015) ("Where a statute provides that a party may recover fees for prevailing at trial, that same party is entitled to fees on appeal for a successful defense.").

IV. CONCLUSION

For the foregoing reasons, the trial court's issuance of a DVPO in this case was not an abuse of discretion and should not be disturbed.

DATED this 20th day of July, 2016.

Respectfully submitted,

WSBA 37480 FOR

Robert Morgan Hill, WSBA #21857
MORGAN HILL, P.C.
Attorney for Respondent

No. 48179-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re:	)	
	)	
JULIE BRANNBERG,	)	AFFIDAVIT OF SERVICE
Respondent,	)	
	)	
vs.	)	Thurston County
	)	Superior Ct. No.
JOSEPH BRANNBERG,	)	15-2-30198-2
Appellant.	)	
	)	
	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

The undersigned, being first duly sworn on oath, now deposes and states:

The undersigned is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

I certify that on July 20, 2016, at 2:00 p.m. I personally arranged for personal service of an original and one true and correct copy of the **Brief of Respondent** upon the following individual:

Washington State Court of Appeals, Division II Court Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454
coa2filings@courts.wa.gov

I certify that on July 20, 2016, at 2:00 p.m. I personally caused to be mailed, a true and correct copy of the **Brief of Respondent** to the following individuals through first-class and certified United States mail, postage prepaid:

Jason W. Anderson
Gregory M. Miller
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Wasington 98104-7010

DATED this 20th day of July, 2016, at Olympia, Washington.

Name: Traci Goodin of
MORGAN HILL, P.C.

SUBSCRIBED AND SWORN to before me this 20th day of July, 2016, by Traci Goodin.

NOTARY PUBLIC
STATE OF WASHINGTON
MEGAN RUE
Commission Expires March 4, 2018

Notary Public in and for the State of Washington, residing at: Olympia, WA
My commission expires 3/4/2018
Print Name: MEGAN RUE